Care Ambulance, Inc. and Care Ambulance, Inc. d/b/a American Ambulance *and* Medical Transportation Workers Association. Case 36-CA-3517

March 31, 1981

DECISION AND ORDER

On September 2, 1980, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in opposition to the exceptions of the General Counsel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,[1] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Care Ambulance, Inc. and Care Ambulance, Inc. d/b/a American Ambulance, Portland, Oregon, and Vancouver, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified.

1. In paragraphs 2(g) and (h) all reference to "Region 36" should be changed to "Region 19."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT unilaterally change any terms and conditions of employment which you enjoyed before selecting Medical Transportation Workers Association as your collective-bargaining representative.

WE WILL NOT bypass your collective-bargaining representative by engaging in direct negotiations with you regarding Emergency Medical Training (EMT) tuition fees.

WE WILL NOT in any like or related manner refuse to bargain collectively with the Union, or interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL, upon request by the Union, reinstate our former practice of paying ambulance personnel double time for overtime night work.

WE WILL, upon request by the Union, reinstate our former sick leave policy, and our former payroll periods and paydays.

WE WILL reimburse employees, with interest, for the expenses incurred in being required

[1] In his Decision, the Administrative Law Judge concluded, *inter alia*, that Respondent had violated Sec. 8(a)(5) and (1) of the Act by engaging in direct dealing with its employees concerning reimbursement of tuition fees for an Emergency Medical Training (EMT) course which certain of its employees were to take. As a result of this unfair labor practice, one of the employees who was schedule to take the course did not do so.

The Administrative Law Judge recommended that Respondent be ordered to pay that employee at the rate of pay he would be earning had he taken and passed the course. Additionally, the Administrative Law Judge recommended that Respondent make that employee whole for wages he would have received had he passed the course along with the other employees. Without offering an alternative remedy, Respondent argues that the Administrative Law Judge's remedy is too speculative since it assumes that the employee would have finished the course, passed the final examination, become certified as an EMT IV by passing the state examination, and remained employed by Respondent.

We have carefully considered Respondent's assertions and have studied possible alternative remedies. However, as Respondent concedes, the wrongdoer must bear the burden of uncertainty in these situations, and we can find no remedy other than that proposed by the Administrative Law Judge which adequately compensates the employee without placing upon him, rather than Respondent, the burden of uncertainty. For example, one alternative remedy would be to allow the employee to take the course with reimbursement by Respondent, and, in the event the employee passes both the course and the state examination, require Respondent to pay the employee retroactively what he would have received had he taken the earlier course and become an EMT IV along with the other employees. The defect in this remedy is that, should the employee now be unable to take the EMT IV course or be no longer in Respondent's employ, he would receive no compensation whatsoever. Such an outcome is clearly unacceptable. Accordingly, we find no satisfactory remedy other than that proposed by the Administrative Law Judge.

Although we thus adopt the remedy recommended by the Administrative Law Judge, we note that pay at the EMT IV level for the employee who dropped the EMT IV course due to his inability to pay will cease if the employee refuses to take the EMT course or fails either the course or the state examination.

to pay a portion of the September 22, 1979, EMT course and for any consequential monetary damages incurred as a result of their having to withdraw from the course.

WE WILL reimburse employees, with interest, for the loss of overtime pay incurred as a result of the change in the payment of overtime night pay at the double time rate; and WE WILL reimburse any employees, with interest, who may have been denied sick leave with pay as a result of the change in sick leave policy.

WE WILL bargain with the Union, upon request, regarding all of the above and other matters, as the collective-bargaining representative of employees in the following described unit:

> All employees employed by us at our Portland, Oregon, and Vancouver, Washington, metropolitan area facilities including drivers, dispatchers, maintenance employees and emergency medical technicians, but excluding office clerical employees, confidential employees, sales employees, guards, shift supervisors and other supervisors as defined in the Act.

CARE AMBULANCE, INC. AND CARE AMBULANCE, INC. D/B/A AMERICAN AMBULANCE

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice a hearing with respect to this matter was held before me in Portland, Oregon, on March 4, 1980. The original charge was filed on September 11, 1979[1] by Medical Transportation Workers Association (herein called the Union), and was amended on October 30. On October 31, the Regional Director for Region 36 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by Care Ambulance, Inc. and Care Ambulance, Inc. d/b/a American Ambulance (herein called Respondent), of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.[2]

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for the Respondent.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with its principal place of business located in Portland, Oregon, and is engaged in the business of providing ambulance and related services in Portland, Oregon, and Vancouver, Washington. In the course and conduct of its business operations Respondent annually purchases and causes to be transferred and delivered to its Oregon facilities goods and materials valued in excess of $50,000 which are transported to said Oregon facilities directly from States other than the State of Oregon.

It is admitted, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Issues*

The principal issues raised by the pleadings are whether Respondent has violated Section 8(a)(1), (3), and (5) of the Act by changing various terms and conditions of employment subsequent to the time its employees selected the Union as their collective-bargaining representative.

B. *The Facts*

On July 2, the Union filed an election petition with the Board in Case 36-RC-4210, and on August 23, following a representation election conducted on August 15, the Union was certified as the exclusive bargaining representative of the following unit of employees:

> All employees employed by the Employer at its Portland, Oregon and Vancouver, Washington metropolitan area facilities including drivers, dispatchers, maintenance employees and emergency medical technicians, but excluding office clerical employees, confidential employees, sales employees, guards, shift supervisors and other supervisors as defined in the Act.

On August 20, Respondent's owner and executive director, Donald Adler, caused notices to be posted advising "ambulance personnel" of a reduction in overtime night pay from double time to time and a half, and advising all employees of a change in Respondent's payroll periods from every 2 weeks to twice each month, resulting in different paydays.[3]

[1] All dates or time periods herein are within 1979 unless stated to be otherwise.

[2] The complaint was further amended at the hearing.

[3] A separate but related notice was posted, stating that "Due to circumstances beyond our control, payday will be delayed this week until

Continued

Thereupon, on the same date, the Union's representative, John Bailey, phoned Adler and advised him that the aforementioned changes were subject to collective bargaining. Adler replied that Respondent was experiencing a financial crisis and had insufficient funds to meet the next payroll, and that he intended to implement the changes. Bailey protested, and a meeting was set up for August 22 to discuss the matters. On August 21, Adler forwarded a letter to Bailey confirming that Adler had previously advised Bailey that Respondent was having "some financial problems." Attached to the letter was a handwritten list of "Deposits" and "Checks" for the prior 4-1/2 months, showing that the checks written by Respondent totaled some $41,000 more than deposits during the same period.

The August 22 meeting was held as scheduled, and the two individuals essentially reiterated their respective positions. Bailey also stated that he was not there for the purpose of then engaging in negotiations. Adler stated that he wanted to meet with the Union's negotiating committee the following day in order to attempt to convince the employees that the changes were necessary, and solicited Bailey's assistance in this regard. Bailey stated that he had been hired by the Union to negotiate in furtherance of the Union's interests and had no intention of attempting to assist Adler in this effort. Bailey further advised Adler that he would not be available for the purpose of negotiating for a period of 7 days, and suggested that during the interim he should contact employee Tom Brokaw, president of the Union.[4]

Adler testified that, in addition to making the aforementioned changes in the overtime pay rate and the payroll periods, he laid off one person in the office, took himself off the payroll, and pursued other cost-saving measures. Adler further testified that the savings to Respondent from the reduction in overtime pay amounted to roughly $600 per month.

Gary Daniels, who became Respondent's general manager in mid-June, testified that, for about a month or a month and a half prior to August 30, Respondent had been experiencing what Daniels regarded as a very high rate of absenteeism and, in an attempt to deal with the problem, he reviewed each employee's absentee record for the calendar year to date. Thereupon, on August 30, four employees, namely Bob Crothers, Lynne Jones, Diane Bash and Tom Brokaw, the Union's president, were handed written warnings for excessive absenteeism, each notice advising the employee of the number of days he or she had been absent, ranging from 12 to 9 days, during the past 8 months commencing January 1. Additionally, the memos contained the following paragraphs:

> Missed days create not only a financial problem to the Company in overtime, but puts additional burdens on your fellow workers as well. When you fail to report for work, someone must work extra hours to take your place or the car must be shut down and the remaining cars have to run some of your calls in addition to their own.
>
> Every time you are absent lowers your value as an employee and reduces your paycheck. Please keep this in mind.

Brokaw and Jones testified that they had received no prior complaints or warnings regarding absenteeism, nor to their knowledge had other employees received such warnings. Further, it was stipulated at the hearing that employees Crothers and Bash would testify similarly.

The record indicates that no written warnings were issued by Respondent between the dates of August 4, 1976, and May 24, 1979. On May 24, an employee received a warning for reporting late to work; on June 11 an employee was advised in writing that a particular form was required to be executed before "third riders" are allowed in ambulances (although this notice is not couched in terms of a warning); and on July 6, an ambulance driver was issued a written notice advising him of his removal from this position for a period of 1 year, with a resultant reduction in pay, due to an accident which was apparently attributable to the employee.

Further, subsequent to the election, Respondent issued a written warning, dated October 3, to two employees for unauthorized use of a company credit card in the amount of $6.75; on October 11, Respondent verbally reprimanded a dispatcher for "losing a car," that is, not knowing the whereabouts of a particular vehicle, and documented this reprimand by a written memo; by memo dated January 10, 1980, Respondent advised an employee of his suspension without pay for two consecutive 48-hour shifts, as a result of failing to complete a shift as instructed; and on February 20, 1980, Tom Brokaw received a written warning for consistently failing to get certain forms signed by ambulance passengers or their representatives.

Prior to September 1, dispatchers were not required to punch in and out on the timeclock. Rather, their work schedules were prepared on a monthly basis and dispatchers were expected to adhere to a posted schedule which merely indicated the shift on which they were to work and apparently whether they were expected to work overtime. If dispatchers' actual hours of work deviated from the posted schedule for any reason, they were instructed to so advise Robert Kurtz, assistant general manager, who would make notations, sometimes on the posted schedule itself and sometimes elsewhere, in order to compute the employees' correct pay. This procedure was changed on September 1, and thereafter the dispatchers were required to punch the timeclock[5] each day when they came to work at the beginning of the shift, and when they left work at the end of the shift. According to Kurtz, this new method was instituted in order to facilitate more accurate recordkeeping and to minimize complaints from dispatchers that they were not receiving the correct overtime pay. Moreover, Kurtz be-

Friday, afternoon, August 24," and suggesting that if necessary, employees could contact Respondent for an advance. However, there is no complaint allegation that this matter is violative of the Act.

[4] However, it appears that, since the Union's negotiating committee was not to be elected until September 7, meaningful negotiations could not commence prior to that date. By letter dated September 7, Bailey advised Adler that negotiations could commence after September 12, and again protested the unilateral changes.

[5] The timeclock had been previously installed and had theretofore been used for other purposes not relevant herein.

lieved that compiling the payroll from the monthly schedule did not satisfy applicable Federal wage and hour laws.

Both Respondent and the employees derive benefit from Emergency Medical Training (EMT) courses in which the employees enroll and which enable them to gain expertise in increasingly advanced areas of emergency medical procedures. These courses are offered by a variety of schools, hospitals, and other institutions, and result in certification for particular types of emergency care which, apparently upon passing an examination, the employee is thereafter able to administer. The certifications progress from EMT I through EMT IV, and the employee's compensation increases in accordance with the level of proficiency, reflected by the certification, each employee has obtained. Moreover, Respondent's billing rate also reflects the nature of the emergency treatment provided, and thus Respondent is equally interested in its employees receiving more advanced EMT certifications.

The record shows that seven employees had been authorized by Respondent to enroll in an EMT IV course offered by Providence Hospital in September. On September 22, the morning of one of the class sessions,[6] the seven employees were summoned to Respondent's premises prior to attending class. Adler summarily announced to the assembled employees that Respondent would no longer pay their tuition, and asked how they proposed to pay for the course. The employees replied that they had assumed Respondent was going to continue paying the tuition in accordance with past practice. Adler stated that this would no longer be the case, and expressed his belief that, if the employees were required to assume the costs, this would give them more incentive to pass the course. Moreover, Adler alluded to Respondent's financial inability to pay for the classes. The employees replied that they were unable to pay the $300 tuition for this particular course, and agreed among themselves that they could not or would not take the class. Adler countered with the suggestion that Respondent would pay half the amount, with the remainder being paid by the employees at the rate of $100 per month deducted from their checks. The employees replied that they could not afford this, and one employee left the room stating that he was financially unable to pay for any portion of the class.[7] The remaining employees, after further discussion with Adler, agreed to pay for half the tuition, to be deducted from their paychecks apparently at the rate of $25 per paycheck.

About a week later, the employees enrolled in the course were required to sign the following letter which apparently embodies the understanding reached at the September 22 meeting:

> Care Ambulance has decided to pay 50% of your training in the current Providence EMT 4 Class.
>
> The total fee of $300.00 will be paid and you will pay back $150.00 by payroll deduction. These deductions will be in the amount of $25.00 per pay check.
>
> If you do not pass the final test or if you fail to complete the class, you will pay back the entire $300.00. If your employment with Care Ambulance ceases prior to the end of the class, for whatever reason, you will pay back the entire $300.00.
>
> I agree to the above conditions.
>
> Employee
>
> Date

The record indicates that the employees who were enrolled in this course had also been enrolled in prior courses, and on each occasion the entire cost of the courses had been borne by Respondent. Thus, Brokaw testified that on four prior occasions Respondent had paid the entire amount; Hansen testified that she had taken "other classes" paid for by Respondent; and Kelley testified that Respondent paid the entire amounts of both of his EMT II and III courses. Moreover, Kelley testified that during his employment interview in October 1977, he was told by Adler that he would be required to take such courses, and that the costs would be paid by Respondent. Kelly further explained that this was one of the primary reasons he accepted the position. Hansen testified that when presented with the aforementioned letter by General Manager Daniels, she asked what would happen if she didn't sign it. Daniels, according to Hansen, replied she would probably lose her job. Daniels testified, however, that he may have told Hansen that if she did not sign she probably wouldn't be going to class.

On January 7, 1980, Respondent posted the following notice:

> One of the company benefits at Care is being paid when you are sick and unable to work, up to six days per calendar year.
>
> Recently our bookkeeping procedures have been somewhat sloppy and we have not adhered strictly to the policy of these days for sick pay accruing at one sick day for each two months of service. In other words, we give you eligibility for one sick day as of January 1; on March 1 you could be eligible for up to two sick days; May 1 up to three days, etc. With the new year, we are going to correct this situation.
>
> We will also retain the right to require proof of illness, in the form of a physician's certificate, in order for you to be paid for a day you are ill.
>
> Some of you are aware that we are presently negotiating with the Medical Transportation Workers union to pay "well" days, or in other words, pay you for any of the sick days you have not been paid for during the year. I hope that this will come about, and for this reason, I urge you to use your sick days wisely.

[6] There is some confusion in the record, however, regarding certain salient facts. Thus, the exhibit introduced in the record reflects that the class commenced on September 27 rather than September 22. One employee who was enrolled in the class, Roberta Hansen, testified that the class was a combination EMT III and IV class, and that the entire EMT III portion and one EMT IV session had been completed prior to September 22, the date the alleged unilateral change, discussed below, was announced. However, another employee, Tom Brokaw, testified that the class commenced on September 22.

[7] This employee is currently employed as an EMT III.

Adler testified that, at an employee meeting in June, it became apparent that the employees did not understand Respondent's sick leave policy. Adler told the employees that they accrued 6 days per year of paid sick leave, apparently after 90 days of employment, but did not explain the method of computation. Up to that point, sick leave had not been a problem, but shortly thereafter, according to Adler, employees "took advantage of it after I explained it to them" and were given paid sick leave before they had earned it. Thus, Respondent felt compelled to set forth its sick leave policy more specifically in the January 7, 1980, memo. According to General Manager Daniels, a policy of computing sick leave based on 6 days of sick leave per year accruing after a 90-day initial period was adhered to in "some instances" as a result of misinterpretation of the policy by the bookkeeper, but this was not the general policy. No witnesses called by the General Counsel testified regarding the aforementioned meeting in June, or presented their understanding of the sick leave policy.

The parties have been negotiating regarding the terms of an initial collective-bargaining agreement, and have met on eight occasions prior to the hearing herein, between the dates of October 5, 1979, and February 29, 1980. Tentative agreement has been reached on a variety of contract items. However, it does not appear that agreement has been reached on the items which are the subject of the alleged unilateral changes herein, except for agreement upon bimonthly pay periods and a discipline and discharge provision which permits Respondent to issue written reprimands.

C. *Analysis and Conclusions*

Respondent concedes that its bargaining obligation commenced on August 15, 1979, the date of the representation election, and continued thereafter. *N.L.R.B.* v. *Benne Katz, et al., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962); *Laney & Duke Storage Warehouse Co., Inc., et al.*, 151 NLRB 248, 266–267 (1965), enfd. 369 F.2d 859 (5th Cir. 1966); *Lawrence Textile Shrinking Co., Inc.*, 235 NLRB 1178 (1978).

Respondent's contention that it was privileged to make unilateral changes in its payroll periods, paydays, and overtime rates for certain personnel as a matter of urgent economic necessity,[8] deemed to be a "crisis situation" by Adler, does not withstand scrutiny. Thus, Adler admitted that, upon speaking with Bailey on August 20, he had initially decided to postpone these changes until September 1, which admission provides irrefutable evidence that the changes were not immediately necessary. Moreover, had the implementation of these changes been postponed until September 1, any savings to Respondent as a result of the reduction of wages would not have been manifested until September 25.[9] Thus, it appears that no emergency situation existed which necessitated such unilateral changes in wages on August 20, the effective date of such changes, and that ample time for bargaining, prior to the implementation of such changes, existed.

Nor am I persuaded that reducing the night overtime rate of ambulance personnel from double time to time and a half would have any significant impact on Respondent's total payroll. Thus, Adler estimated that the savings to Respondent would amount to about $600 per month, whereas the record shows the total monthly payroll, excluding managements wages, to exceed $60,000. Additionally, Respondent has not shown that this relatively insignificant $600-per-month efficiency measure could not have been effectuated by reducing the salaries of other nonunit personnel or by some other method which would not affect unit employees. While the record summarily shows that Respondent may have engaged in other cost-saving measures, there is no evidence or even a contention by Respondent that it was compelled to reduce the overtime rate of unit employees after exhausting all other reasonable avenues of reducing costs. Further, Respondent has not demonstrated that changing its payroll periods and paydays would alleviate the purported financial crisis, nor did Respondent adduce evidence to show that such changes, if necessary at the time to manage a "cash flow" problem, could not have been instituted as a stop-gap expediency rather than as a permanent change.

I therefore find that Respondent was not compelled by economic necessity to make the aforementioned changes, and under the circumstances it was not incumbent upon the Union to abandon the normal approach to collective bargaining and commence bargaining on an emergency piecemeal basis as Respondent desired. *Kroehler Mfg. Co., supra.* I conclude that by such unilateral conduct Respondent violated Section 8(a)(5) of the Act, as alleged.

The record is clear and Respondent admits that it "generally" paid for the entire amount of the EMT course fees in which its employees were enrolled. Seven employees had been enrolled in the September course, and it appears that none of these employees had been required to pay any part of the tuition or fee for prior EMT courses in which they had been enrolled. There is no doubt that, at the time the employees became enrolled in the course, they believed, based on past practice, that Respondent would pay the entire amount. Indeed, Adler seems to have acknowledged this on September 22, as he advised the employees of his decision to, in effect, discontinue Respondent's policy in this regard for reasons of cost and as an incentive to the employees.

The record evidence discloses that, since April 1978, there have been 7 EMT courses, variously denoted as EMT I through EMT IV and that, except for the EMT IV course involved herein, the Employer paid the entire cost of such courses for 29 out of 35 employees.[10]

[8] See *N.L.R.B.* v. *Benne Katz, supra*, wherein the Supreme Court stated that "there might be circumstances which the Board could or should accept as excusing or justifying unilateral actions." See also *Kroehler Mfg. Co.*, 222 NLRB 1269 (1976).

[9] The first payday following September 1, according to the notice posted by Adler, would be on September 25, reflecting a payroll period of September 1–15.

[10] Six employees were enrolled in an EMT III course in January 1979, and Respondent paid the entire $350 fee for each of the employees. Five employees were enrolled in an EMT II course in February 1979, and Respondent paid the entire cost for three of the employees, but two employees paid the entire cost themselves. Four employees were enrolled in an EMT III and IV course on August 17, 1979, and Respondent paid $250

Continued

The record shows that Respondent had established a general policy of paying the total amount of employees' EMT course fees. However, this policy was not absolute, and on occasion Respondent would, in effect, negotiate with certain employees regarding the matter. Indeed, this appears to have been the case, so far as the record exhibit shows, regarding an EMT III and IV course on August 17, 1979, subsequent to the election, where the $500 cost of the course was split, each of the four employees paying $250.[11] While the record therefore establishes a deviation from the general policy, it is clear that Respondent, on September 22, engaged in direct negotiations with certain of its employees regarding the EMT course in question herein, subsequent to the time the employees had been enrolled in the course. Respondent, however, was at that time obligated to bargain regarding this matter with the Union, rather than with a group of employees who represented neither the Union nor the other unit employees not involved in the courses. *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1978). Thus, by dealing directly with the employees and thereby bypassing their exclusive bargaining representative, Respondent has violated Section 8(a)(5) of the Act.[12] *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678 (1944); *Courtesy Volkswagen, Inc.*, 200 NLRB 84 (1972); *Mosher Steel Company*, 220 NLRB 336 (1975).

The record demonstrates that at no time prior to the January 7, 1980, memo were any employees ever specifically advised, either verbally or in writing, that they accrued sick leave at the rate of 1 day of sick leave for each 2 months of service. While Respondent's supervisors admit that Respondent has not "strictly" adhered to this policy due to misinterpretation of the policy by the bookkeeper, there is no record evidence, other than these self-serving generalizations, that such a policy was ever enforced. It is therefore clear that the announcement of the sick leave policy on January 7, 1980, constituted a substantial if not total departure from actual past practice, and that prior to January 7 the policy enunciated by Respondent was honored, if at all, more in the breach than in practice. Thus, I conclude that Respondent's announcement and apparent application of the new rule subsequent to January 7, 1980, constituted a unilateral change violative of Section 8(a)(5) of the Act.

Between the dates of October 3, 1979, and February 20, 1980, Respondent issued four warning notices to various individuals for specific rule infractions. The General Counsel maintains that the aforementioned warning notices are a clear departure from Respondent's established practice,[13] and therefore constitute a unilateral change violative of Section 8(a)(5) of the Act. I do not agree. The record shows that written warnings, although infrequent, had been utilized by Respondent as a disciplinary measure immediately prior to the advent of the Union. Moreover, the nature of the written warnings issued between October 3, 1979, and February 20, 1980, are not unlike those issued prior to the election, and denote specific instances of rule infractions the nature of which, on their face, would appear to justify Respondent's determination to maintain file memoranda of such infractions. Further, the General Counsel does not appear to contend that the warnings were unjustified, and the fact that more written warnings were issued subsequent to the election would appear to coincide with the appointment of Gary Daniels as general manager, who elected to continue the warning notice system of discipline which had been utilized prior to the election herein. Under the circumstances, I find the record insufficient to sustain the complaint allegation that Respondent unilaterally instituted a written disciplinary warning system in violation of Section 8(a)(5) of the Act. Cf. *Amoco Chemicals Corporation*, 211 NLRB 618, 622-623 (1974).

Regarding the warning notices for absenteeism, the record stands unrebutted that Respondent was experiencing what it regarded as an inordinate amount of absenteeism, and that the four employees in question had the poorest attendance records among all unit employees. Evidence adduced by Respondent shows that the attendance problem became particularly apparent in July and August, and the General Counsel did not present evidence to show that the attendance of the four employees receiving such notices was, at that time, either satisfactory or no worse than other employees. Therefore, I conclude that the recored is insufficient to demonstrate that the warning notices were discriminatorily motivated. Further, as found above, Respondent's use of warning notices does not appear to constitute a unilateral change in its disciplinary procedure following the election herein. I shall therefore dismiss both the 8(a)(3) and (5) allegations pertaining to the issuance of the instant warning notices for absenteeism.

The testimony of Respondent's witness is unrebutted that the new timeclock policy was instituted primarily for the purpose of insuring that employees would receive the correct pay, and was largely instituted in response to complaints by employees that they were not receiving pay for overtime they had worked. Respondent attributed this error to inaccurate recordkeeping on the part of Assistant General Manager Kurtz as a result of his use of a monthly dispatch schedule and notes to himself which he sometimes inadvertently overlooked when causing the payroll to be prepared. There was no testimony that punching the timeclock would reflect adversely upon the employees, or have a deleterious effect upon their established working conditions, as the timeclock would merely reflect what employees were required to report either verbally or on the monthly dispatch schedule. I

of the $500 cost for each employee. Other courses which were fully or partially paid for by the employees were not denoted as EMT courses.

[11] There is no complaint allegation that Respondent violated the Act by causing employees to partially pay for the August 17 EMT course, and it would appear that any agreement between Respondent and the four employees regarding the payment of such tuition fees must have been reached prior to August 15, the date of the election. The record contains no further evidence regarding this matter.

[12] Although the complaint allegation is couched in terms of "unilateral change," the material facts herein are not in dispute and, in my estimation, the matter has been fully litigated. Therefore I deem it appropriate, and not prejudicial to Respondent, to base my finding upon the alternate theory herein. See *C & E Stores, Inc. C & E Supervalue Division*, 221 NLRB 1321, fn. 3 (1976); *Red Barn System, Inc.*, 224 NLRB 1586 (1976).

[13] Apparently, the General Counsel would contend that verbal warnings, rather than written warnings, should have been given for the various infractions.

therefore find that the evidence is insufficient to show that Respondent's determination to require dispatchers to punch a timeclock was violative of Section 8(a)(5) and (1) of the Act. *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976); *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978); *Wabash Transformer Corp., Subsidiary of Wabash Magnetics, Inc.*, 215 NLRB 546 (1974).

The complaint alleges and the General Counsel contends that each of the complaint allegations discussed above also constitute conduct violative of Section 8(a)(3), as well as of Section 8(a)(5), of the Act. The record contains no independent evidence of union animus by Respondent and Respondent's witnesses specifically denied that the conduct herein was undertaken in retaliation for any union activity. I am unable to conclude that the unfair labor practices herein, either singly or collectively, are sufficient in and of themselves to warrant the determination that Respondent's conduct was discriminatorily motivated. Moreover, such a finding would not materially affect the remedy herein. I shall therefore dismiss each of the 8(a)(3) complaint allegations. *Capitol Trucking, Inc.*, 246 NLRB 135 (1979); *Appalachian Power Company, John E. Amos Plant*, 250 NLRB 228 (1980).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing its payroll periods, paydays, and overtime rates for unit employees; by negotiating directly with the employees regarding the method of payment for EMT courses, thereby bypassing the Union as the collective-bargaining representative of Respondent's employees; and by unilaterally changing its sick leave policy.
4. Except as found above, Respondent has not engaged in other unfair labor practices as alleged.

THE REMEDY

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally abrogating or changing certain employment benefits enjoyed by employees, and by bypassing the Union and dealing directly with its employees regarding tuition fees for EMT courses, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Such affirmative action shall include reinstatement of certain employment benefits, reimbursement to employees for their loss of overtime pay, with interest, for EMT tuition expenses they incurred, with interest, and for their loss of pay, if any, as a result of being denied paid sick leave in accordance with Respondent's established policy, also with interest. I shall also recommend that Respondent cease and desist from engaging in any like or related conduct, and post an appropriate notice.

Moreover, as the record shows that one unidentified employee dropped out of the September 22 EMT IV course as a result of inability to pay, it shall also be recommended that Respondent commence paying him the amount he would be earning had he taken and passed the course, and that Respondent make him whole, retroactively and with interest, for the wages he would have received had he passed the course along with the other employees. Whether this particular employee would have passed the EMT IV course, thereby becoming entitled to a wage increase, is entirely speculative. However, the burden of this uncertainty must fairly rest with the wrongdoer rather than the victim. See *Viele & Sons, Inc.*, 227 NLRB 1940, 1950 (1977); *The Lima Lumber Company*, 176 NLRB 696 (1969), enfd. 437 F.2d 455 (6th Cir. 1971).

Based upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondent, Care Ambulance, Inc. and Care Ambulance, Inc. d/b/a American Ambulance, Portland, Oregon, and Vancouver, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Medical Transportation Workers Association as the certified representative of employees in the appropriate unit, by unilaterally making changes in employees terms and conditions of employment without affording the Union a sufficient opportunity to bargain about such changes, and by dealing directly with unit employees and thereby bypassing the Union as the employees' exclusive collective-bargaining representative. The appropriate unit is:

> All employees employed by the Employer at its Portland, Oregon and Vancouver, Washington metropolitan area facilities including drivers, dispatchers, maintenance employees and emergency medical technicians, but excluding office clerical employees, confidential employees, sales employees, guards, shift supervisors and other supervisors as defined in the Act.

(b) In any like or related manner refusing to bargain with or interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, restore the *status quo ante* regarding overtime pay, payroll periods and paydays, sick leave policy, and the practice of paying for the entire amount of employees' EMT tuition fees, and bargain with the Union concerning all proposed changes in terms and

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

conditions of employment of the employees in the appropriate unit.

(b) Reimburse employees, with interest, for the loss of overtime pay incurred as a result of Respondent's unilateral discontinuance of overtime night pay at the double time rate.

(c) Reimburse employees, with interest, for the tuition expenses incurred as a result of being required to partially pay for the September 22 EMT IV course.

(d) Make whole the employee, retroactively and with interest, who dropped out of the aforementioned EMT IV course as a result of financial inability to pay, and commence paying him the amount he would be earning had he taken and passed the course.

(e) Reimburse any employees, with interest, who may have been denied sick leave with pay as a result of the change in the sick leave policy.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at Portland, Oregon, and Vancouver, Washington, facilities copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 36, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 36, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."